84-1957

Office-Supreme Court, U.S.
FILED
JUN 14 1985
ALEXANDER L. STEVAS,
CLERK

No._____

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

R. K. PROCUNIER, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

V.

CLIFTON FRANSAW,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

WHETHER A FEDERAL HABEAS COURT SHOULD HOLD THAT A STATE CONTEMPORANEOUS OBJECTION RULE HAS BEEN WAIVED WHEN NO STATE COURT HAS BEEN AFFORDED AN OPPORTUNITY TO DETERMINE ITS APPLICABILITY.

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

The petitioner[1] respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on January 30, 1985, rehearing *en banc* denied on March 18, 1985.

OPINIONS BELOW

The panel opinion of the court of appeals is attached hereto as Appendix G. The order of the court of appeals denying petitioner's suggestion of rehearing *en banc* is attached hereto as Appendix H.

[1]For clarity, petitioner in this Court and respondent below, R. K. Procunier, Director of the Texas Department of Corrections, will be referred to as the state, the real party in interest. Respondent in this Court and petitioner below, Clifton Fransaw, will be referred to as Fransaw.

JURISDICTION

The judgment of the court of appeals was entered on January 30, 1985. A timely filed suggestion of rehearing *en banc* was denied March 18, 1985. This petition for writ of certiorari is filed within ninety days after final judgment in this case. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 2254 of Title 28 of the United States Code provides, in pertinent part, as follows:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

STATEMENT OF THE CASE

A. The 1981 Conviction

The state has lawful custody of Fransaw pursuant to a judgment and sentence of the 262nd District Court of Harris County, Texas, in Cause No. 321,185, styled *The State of Texas v. Clifton Fransaw.* Fransaw pled not guilty to the felony offense of murder and was tried by a jury, which on December 14, 1981, found him guilty of the lesser included offense of voluntary

manslaughter. At the punishment phase of the trial, Fransaw pled "true" to the allegation in the indictment that he had been convicted in 1975 of the felony offense of aggravated robbery in Cause No. 223,395 in the 183rd District Court of Harris County (SF Vol. II 5).[2]

When the state introduced evidence of this prior conviction, Fransaw, by and through counsel, specifically stated, "[w]e have no objection" (SF II 5).[3] Upon proof of the prior conviction, Fransaw was sentenced to life imprisonment. *See* Tex. Penal Code Ann. § 12.42(b) (Vernon Supp. 1985). Fransaw appealed the 1981 conviction to the Texas Court of Appeals for the Fourteenth District, which affirmed on June 30, 1983. *Fransaw v. State*, No. A14-82-022-CR. Fransaw did not challenge the validity of the 1975 conviction in this appeal.

B. The 1975 Conviction

In the 1975 conviction used for enhancement, Fransaw was convicted of the felony offense of aggravated robbery in Cause No. 223,395 in the 183rd District Court of Harris County. Upon Fransaw's plea of guilty, punishment was assessed at ten years incarceration, but the imposition of sentence was suspended and Fransaw was placed on probation for ten years. On October 9, 1975, the state filed a motion to revoke probation, and on October 31, 1975, Fransaw entered a plea of "true" to the allegations contained in the state's motion. Probation then was revoked and the sentence was reformed to four years incarceration. On November 7, 1975, notice of appeal was filed, but it was withdrawn by Fransaw in open court three days later.

C. The State Habeas Proceedings

Fransaw has filed three applications for state habeas relief pursuant to Tex. Code Crim. Proc. Ann. art. 11.07 (Vernon 1979), only one of which is relevant to the instant action. Fransaw's first two applications were denied by the Texas Court

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[2]"SF" refers to the statement of facts of Fransaw's trial; the cover of Volume II of the statement of facts is labeled "Vol. VI--Punishment."

[3]Volume II of the statement of facts contains two pages numbered "5;" this citation is to the second "page five."

of Criminal Appeals on February 22, 1984. *Ex parte Fransaw*, No. 10,886. One of these applications challenged Fransaw's 1975 conviction in Cause No. 223,395 and is discussed at length below; the other application challenged an unrelated August 3, 1981, conviction for aggravated robbery in Cause No. 337,572 in the 228th District Court of Harris County. Fransaw's third state writ application, denied January 9, 1985, challenged his 1981 conviction in Cause No. 321,485 on grounds not relevant to the instant cause.

The state writ application attacking Fransaw's 1975 conviction in Cause No. 223,395 was filed in the convicting court, the 183rd, as required by Tex. Penal Code Ann. art. 11.07 § 2(b), and not in the court in which his 1981 conviction was had, the 262nd. Fransaw alleged that he was denied the effective assistance of counsel and that he was not advised of his appellate rights. *See* Appendix A at 2. The most important fact in this request for certiorari is that nowhere in his state writ application did Fransaw challenge the use of this 1975 conviction to enhance his 1981 sentence in Cause No. 321,485; the state writ application contains no reference to the 1981 conviction in Cause No. 321,485.

The state responded to this state writ application, asserting that there were material, unresolved facts regarding the 1975 conviction in Cause No. 223,395, *i.e.*, whether Fransaw had effective assistance of counsel and whether he was advised of his appellate rights. *See* Appendix B. The trial court, at the request of the state, ordered Fransaw's trial counsel, the Honorable Harrison Gregg, Jr., to file an affidavit responding to Fransaw's claim of ineffective assistance. *See* Appendix C. Gregg thereafter filed two affidavits. *See* Appendices D & E. On the basis of the state's answer and Gregg's affidavits, the trial court made certain factual findings and recommended that the writ be denied. *See* Appendix F. The Texas Court of Criminal Appeals denied the writ on the basis of these findings. Neither Gregg's affidavits nor the trial court's findings make any reference to the use of the 1975 conviction for enhancement in Fransaw's 1981 trial.

D. The Federal Habeas Proceedings

On March 9, 1984, Fransaw filed the instant action in the United States District Court for the Southern District of Texas, Houston Division, *Fransaw v. McKaskle*, No. H-84-1087, challenging his 1975 conviction in Cause No. 223,395 on the same grounds he had raised in his state writ, *i.e.*, ineffective assistance of counsel and failure to advise him of his appellate rights.

The state moved to dismiss on the grounds that Fransaw had failed to exhaust his state remedies, 28 U.S.C. § 2254(b), (c), and had procedurally defaulted. *See Engle v. Isaac*, 456 U.S. 107 (1982); *Wainwright v. Sykes*, 433 U.S. 72 (1977). The state argued that inasmuch as Fransaw's federal writ challenged *the use of* the 1975 conviction for enhancement in 1981, whereas his state writ had only been a direct challenge to *the validity of* the 1975 conviction, his legal claims lacked the identity of issues required to satisfy the exhaustion requirement. As will be explained, this distinction between the use of a conviction and the validity of a conviction is an important one. The state also argued that because Fransaw had failed to object when evidence of the 1975 conviction was introduced at his 1981 trial, he had procedurally defaulted any challenge to use of the 1975 conviction for enhancement.

On September 20, 1984, the federal district court entered a memorandum and order denying the writ. The court did not address the state's exhaustion argument, instead holding that Fransaw had procedurally defaulted his claims by failing to object when evidence of his 1975 conviction was introduced at trial in 1981.

Fransaw then filed notice of appeal, but the district court denied him a certificate of probable cause to appeal. On January 30, 1985, a panel of the United States Court of Appeals for the Fifth Circuit granted a certificate of probable cause and, *without affording the state an opportunity to brief the case*, vacated and remanded. The panel reasoned as follows:

> The state courts considered the merits of the two issues [ineffective assistance and denial of appellate

> review] raised in the federal habeas corpus petition. Where the state courts themselves have not relied on the "contemporaneous objection" rule but instead have dealt with the issues raised on the merits, the procedural bar of *Engle v. Isaac,* 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) and *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977) does not apply. *Moran v. Estelle,* 607 F.2d 1140, 1142 (5th Cir. 1979).

See Appendix G.

On March 18, 1985, the court of appeals denied the state's suggestion of rehearing *en banc.*

SUMMARY OF ARGUMENT

The court of appeals erred in holding that the state courts had waived their contemporaneous objection rule by addressing Fransaw's claims on the merits. Fransaw's state writ application challenged only the validity of his 1975 prior conviction and did not attack its use for enhancement at his 1981 trial. The state courts therefore were never afforded an opportunity to determine the applicability of their contemporaneous objection rule. Absent such an opportunity, the state courts cannot be said to have excused Fransaw's failure to object when evidence of the 1975 conviction was offered at his trial in 1981. In holding to the contrary, the court of appeals ignored the distinction between attacking the validity of a conviction and it subsequent use for enhancement of punishment. The net effect of the holding of the court of appeals is to eviscerate both the statutory exhaustion requirement and the procedural default doctrine.

REASONS FOR GRANTING THE WRIT

A FEDERAL HABEAS COURT SHOULD NOT HOLD THAT A STATE CONTEMPORANEOUS OBJECTION RULE HAS BEEN WAIVED WHEN NO STATE COURT HAS BEEN AFFORDED AN OPPORTUNITY TO DETERMINE ITS APPLICABILITY.

The writ should be granted because the court of appeals' decision conflicts with the decisions of this Court in *Rose v. Lundy,* 455 U.S. 509 (1982), *Engle v. Isaac,* 456 U.S. 107 (1982) and *Wainwright v. Sykes,* 433 U.S. 72 (1977). The court of appeals failed to distinguish between the *validity* of a conviction and the *use* of a conviction for enhancement. Reversal of a conviction does not automatically require that any use of the conviction for enhancement must also be reversed. *See, e.g., Weaver v. McKaskle,* 733 F.2d 1103 (5th Cir. 1984). A criminal defendant may be entitled to challenge the validity of a conviction yet have waived his objection to the use of the conviction for enhancement by failing to object to its introduction in evidence. While at first blush this application of the procedural default rule may seem harsh, the rule is necessarily applied in this way to preserve the finality of convictions and to preserve judicial resources by ensuring that objections are raised at the earliest opportunity.

The state system recognizes the distinction between the *validity* of a conviction and its *use for enhancement.* Under Texas habeas procedure, separate attacks may be made on validity and use for enhancement. In this case, Fransaw attacked the validity of his 1975 conviction by a state writ application but did not attack the use of the 1975 conviction for enhancement in 1981. By reasoning that the state court consideration of the validity of the 1975 conviction allowed the federal court to consider the use of the conviction for enhancement in 1981, the Fifth Circuit frustrated both the exhaustion doctrine of *Rose v. Lundy* and the procedural default doctrine of *Engle v. Isaac,* and *Wainwright v. Sykes.*

This result will occur again and again unless this Court reviews and overrules the Fifth Circuit because the result follows from a firmly established Fifth Circuit precedent: *Escobedo v. Estelle,* 650 F.2d 70, *modified on petition for rehearing,* 655 F.2d 613 (5th Cir. 1981). The facts of *Escobedo* are very similar to those of the instant case. In *Escobedo,* the petitioner's federal writ application challenged the use of a 1970 conviction for enhancement in his 1977 trial. Although the petitioner had filed a state writ application directly attacking the 1970 conviction, he had not challenged in state court its use for enhancement in 1977.

In reversing the district court's dismissal for failing to exhaust state remedies, a panel of the Fifth Circuit found that Escobedo's challenge to his 1970 conviction (but not to its use for enhancement in 1977) had satisfactorily exhausted his federal claim attacking the use of the 1970 conviction for enhancement in 1977:

> It is true that under *Burgett v. Texas,* 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), a constitutionally invalid prior conviction may not be used to enhance the sentence given for a subsequent conviction. And it is also true that the Texas courts have uniformly allowed defendants to attack collaterally the validity of a prior conviction in the context of a direct appeal from an enhanced sentence imposed for a subsequent conviction. *E.g., Walker v. State,* 486 S.W.2d 330 (Tex. Cr. App. 1972). But the Texas courts have *not* held that a prior conviction's validity may *only* be attacked in that context. Rather, the Texas courts have allowed defendants to attack collaterally a prior conviction in a *separate* state-court habeas action, even after the subsequent conviction and enhanced sentence have been affirmed on direct appeal.
>
> For example, in *Ex parte Harp,* 561 S.W.2d 180 (Tex. Cr. App. 1978), a habeas corpus attack on a prior conviction, the Texas Court of Criminal Appeals voided the prior conviction on grounds that the petitioner had been without counsel at his probation revocation hearing. This prior conviction had been used to enhance the sentence given the petitioner under a later conviction, and the later conviction and enhanced sentence had been affirmed on direct appeal prior to the habeas attack on the first conviction. The court allowed the independent attack on the prior conviction, but refused to review the propriety of the sentence for the later conviction until the petitioner had filed an independent habeas attack on that conviction in the proper state district court.
>
> This result seems altogether logical and proper, for a prior conviction may have *many* "serious collateral

> consequences" of the sort that are cognizable under Texas habeas corpus law, including some consequences that are completely distinct and independent from the prior conviction's use for enhancement purposes. In other words, there may not be a complete overlap between the purposes that are served by a collateral attack on a prior conviction in the context of a habeas corpus action, and by a collateral attack on a prior conviction in the context of a direct appeal from a later conviction in which the prior conviction has been used for sentence enhancement.
>
> We think it sufficiently clear, then, that Escobedo's state-court habeas petition "fairly presented" his federal claim to the Texas Court of Criminal Appeals, and that the court's decision thereupon was on the merits.

Id. at 74 (footnotes omitted) (original emphasis).

Thus, *Escobedo* stands for the proposition that the exhaustion requirement is satisfied when a prior conviction is challenged on the same legal grounds in state and federal court regardless whether the attack is made directly on the prior conviction itself or on its subsequent use for enhancement. The rule of *Escobedo* frustrates the purposes underlying the statutory exhaustion doctrine in that it effectively dispenses with the requirement that the claims presented in federal habeas be identical to those raised in the state system. Under *Escobedo,* a petitioner will be deemed to have exhausted his state remedies with regard to an attack on a prior conviction used for enhancement even though his state court challenge to the prior conviction addressed only its validity and not its use.

When the rule of *Escobedo* comes into play in the context of procedural default, the result is doubly unfair. The procedural default doctrine enunciated in *Wainwright v. Sykes,* 433 U.S. 72 (1977) instructs that absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim is non-reviewable in state

court because of the default. *See Engle v. Isaac,* 465 U.S. 107 (1982). The Fifth Circuit has consistently applied the procedural default rule to hold that a petitioner's failure to object to evidence of prior convictions waives any challenge to the validity of those convictions. *E.g., Vail v. Procunier,* 747 F.2d 277 (5th Cir. 1984); *Weaver v. McKaskle,* 733 F.2d 1103 (5th Cir. 1984); *Kemph v. Estelle,* 621 F.2d 152 (5th Cir. 1980). Under *Moran v. Estelle,* 607 F.2d 1140 (5th Cir. 1979), however, procedural default does not apply in situations where the state courts do not rely on their own contemporaneous objection rule but instead address the claim on the merits. When *Escobedo* and *Moran* are both held applicable,[4] as in the instant case, the result perverts the rationale behind each rule.

As explained in *Escobedo*, 650 F.2d at 74 & n.9, Texas habeas procedure does not have an "in custody" requirement similar to federal habeas; thus, a defendant can attack the validity of a prior conviction independent of its subsequent use for enhancement. Where, as here, the state petition attacks only the prior conviction and not its use for enhancement, the state courts simply never have occasion to determine the applicability *vel non* of their contemporaneous objection rule. In other words, where the state petition does not assert that evidence of the prior conviction was improperly admitted at a later trial, the question whether a proper objection was made simply does not come into play. The court of appeals' holding in this case fails to distinguish between Fransaw's state court challenge to the validity of his 1975 conviction and his federal court attack on its use for enhancement at his 1981 trial. Thus, the court below incorrectly concluded that the state has waived its contemporaneous objection rule by addressing the claim on the merits.

The comity interests underlying the statutory exhaustion requirement dictate that allegations raised in federal court be "fairly presented" to the state courts for their consideration. *Picard v. Connor,* 404 U.S. 270, 275 (1971). The procedural default doctrine, being likewise rooted in considerations of

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[4]Although the federal district court pretermitted the exhaustion issue, under *Escobedo,* the Fifth Circuit would hold that Fransaw exhausted his state remedies. *Escobedo* was wrongly decided, and the error in this case follows from *Escobedo.*

federal-state comity, *see Engle v. Isaac*, 456 U.S. at 138 & n.33; *Wainwright v. Sykes*, 433 U.S. at 82-83, should require no less. As *Wainwright v. Sykes* and its progeny have stressed repeatedly, a state's insistence on compliance with its contemporaneous objection rule serves valuable interests, among them the intergrity of the fact-finding process and the finality of litigation. *Id.* at 88-90. The Fifth Circuit's holding disregards these important considerations and creates a procedural windfall for habeas petitioners who choose to avoid the procedural default rule by merely attacking the validity of a state conviction in state court and then, under *Escobedo* and the holding in this case, for the first time in any court, challenging the use of a conviction in federal court. Both the exhaustion requirement and the procedural default doctrine are thereby circumvented.

Unless this Court reviews this case by certiorari, the error of the Fifth Circuit will go uncorrected. In *Escobedo*, the Fifth Circuit granted a rehearing on a ground unrelated to the exhaustion holding, which remains intact. In this case, the state requested rehearing *en banc*, which was denied. The state is aware of no other circuit in which this problem has arisen. Perhaps the problem flows from a special feature of Texas collateral review: the ability to separate an attack on the validity and use of a conviction. In any event, there are a number of these cases, and unless this Court reverses the Fifth Circuit, its error will go unchecked.

CONCLUSION

For these reasons, Petitioner prays that the petition for certiorari to the United States Court of Appeals for the Fifth Circuit issue.

Respectfully submitted,

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APPENDIX A

Cause No. 223395

Writ No. _____

EX PARTE	)
	(**IN THE DISTRICT COURT**
CLIFTON FRANSAW	) **OF HARRIS COUNTY, TEXAS**
Petitioner	(**183RD JUDICIAL DISTRICT**

APPLICATION FOR WRIT OF HABEAS CORPUS MOTION TO VACATE THE JUDGEMENT OF A PRIOR CONVICTION; OR IN THE ALTERNATIVE, A MOTION FOR A OUT OF TIME APPEAL

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CLIFTON FRANSAW, Petitioner in the above entitled and Captioned Cause Number, and files this his Application For Writ of Habeas Corpus pursuant to Article 11.07, V.A.C.C.P. Petitioner prays that this Honorable Court will allow him to file this Application and grant him the relief requested therein.

Respectfully Submitted,

/s/

Clifton Fransaw, Petitioner
TDC #328962
Beto Two, Rt. 2, Box 250
Palestine, Texas 75801

1. Court of Conviction — 183RD Judicial District Court of Harris County, Texas

2. Indictment Number — 223395

3. Offense Charged — Aggravated Robbery (reduced to robbery)

4. Plea Entered — Guilty

5. Date of Conviction — October 31, 1975

6. Punishment Imposed — Four (4) Years

7. Appeal From Conviction — Involuntarily Waived

8. Found Guilty By — Judge; Jury Waived

9. Grounds Presented For Relief:

(A) DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6th and 14th AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

(B) DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DUE TO THE TRIAL COURTS FAILURE TO ADVISE PETITIONER OF HIS APPEAL RIGHTS

I.

STATEMENT OF THE CASE

10. On the 21st day of August, 1975, Petitioner entered a plea of guilty in Cause No. 223395, for the offense of Robbery, in the 183rd District Court of Harris County, Texas. Petitioner, who was represented by retained counsel John B. Patrick, was given a 10 year probation.

11. On or about the 9th day of October, 1975, the District Attorney filed a Motion to have Petitioner's probation revoked and sent to the Texas Department of Corrections. On October 21, 1975, Petitioner appeared in the 183rd District Court for a hearing on the States Motion to revoke his probation. Petitioner was represented by retained counsel Harrison Gregg. The hearing was reset for Oct. 31, 1975.

12. On October 31, 1975, Petitioner, along with Counsel Gregg's, appeared in the 183rd District Court for the Revocation hearing. After hearing evidence presented by States Attorney, the Court found Petitioner guilty of probation violation and ordered the Judgement reformed to show 4 years in prison instead of the 10 years originally imposed. On November 7, 1975, Petitioner filed a timely notice of appeal from the imposition of the Judgement and Sentence pronounced upon him.

13. On November 10, 1975, Petitioner appeared in Court with counsel Gregg for a hearing on his appeal notice. The trial Judge, after hearing counsel Gregg tell him that they was dropping the appeal, and Petitioner advising him that he did not want his appeal dropped, advised counsel and Petitioner to go in his chambers and see if they could reach an agreement as to whether there was going to be an appeal or not. Counsel Gregg, Petitioner, Ms. Evelyn J. Fransaw (Petitioner's sister) and Mrs. Mary L. Fransaw (Petitioner's mother; went into the Judge's Chambers and discussed the fate of Petitioner's appeal.

14. After being advised by counsel Gregg that he was not retained to handle the appeal, and would do so only if he was paid by Petitioner or his family. After informing counsel Gregg that his mother and sister could not afford to pay him for representing him on appeal, Petitioner allowed counsel Gregg to make an involuntary dismissal of his appeal notice. The trial Judge, nor counsel Gregg, ever advised Petitioner that he could appeal his case with the assistance of court appointed counsel since he was to poor to pay counsel Gregg or any other attorney to handle the appeal for him, and it was his desire to continue with the appeal to the Texas Court of Criminal Appeals.

II.

ARGUMENT AND AUTHORITIES GROUNDS OF ERROR 9.A RESTATED

DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6th and 14th AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

15. On or about the 1st day of October, 1975, counsel Gregg was retained by Mary L. Fransaw and Evelyn J. Fransaw to represent Petitioner during a hearing in Cause No. 223395 in the 183rd District Court of Harris County, Texas, wherein the State of Texas filed a motion to revoke Petitioner's probated yerm of 10 years which he received in Cause No. 223395 on the 21st day of August, 1975. Counsel Gregg was paid the sum of $750.00 for his representation on the probation revocation hearing. (See Exhibit A & B)

16. On October 21, 1975, Petitioner and counsel Gregg appeared in court for a hearing on the States Motion to revoke his probation, however, the hearing was reset by the court for the 31st of October, 1975. On October 31st Petitioner, along with counsel Gregg, appeared in court for the hearing on the States motion to revoke his probation. The court, after hearing the evidence submitted by the states attorney, found Petitioner guilty of violating the terms and conditions of his probation. The court ordered the judgement to be reformed to 4 years and proceeded to sentence Petitioner to 4 years in the Texas Department of Corrections and ordered the Sheriff of Harris County to immediately deliver Petitioner to same prison.

17. Petitioner was not questioned by counsel Gregg, either before or after he was sentenced, as to whether he wanted to appeal his case. The trial court Judge also failed to inquire of Petitioner about his appeal rights and as to whether he wanted to appeal his conviction or forego his rights of appeal.

III.

PETITIONER'S APPEAL NOTICE

18. Petitioner, after being placed back in the County Jail to await transfer to TDC, was advised by some other inmates that he could appeal his conviction to the Court of Criminal Appeals. On November 7, 1975 Petitioner's notice of appeal was filed with the clerk of the Harris County District Court in Cause No. 223395, from the judgement and imposition of sentence pronounced upon him on the 31st of October, 1975.

IV.

HEARING ON APPEAL

19. On November 10, 1975, Petitioner and counsel Gregg appered in court for a hearing before the Honorable Judge Joseph M. Gureno. Also present in court was Mary L. Fransaw and Evelyn J. Fransaw (See Exhibit A & B). The hearing was called by the court to determine whether Petitioner was going to continue with his appeal request or if there was going to be a dismissal of the appeal.

20. Counsel Gregg informed the court that Petitioner was going to withdraw his notice of appeal. Petitioner, upon hearing counsel tell the court that he was withdrawing his notice of appeal, immediately advised the court that he "was not going to withdraw his notice of appeal" because it was his intentions to pursue his appeal to the Court of Appeals. The trial court, upon hearing that there was a disagreement between Petitioner and counsel as to whether or not there was going to be an appeal, requested that they go to his chambers and see if they could come to an agreement among themselves about the appeal issue.

V.

APPEAL DISCUSSION IN JUDGES CHAMBERS

21. Petitioner, counsel Gregg, Mary L. Fransaw and Evelyn J. Fransaw went into the chambers of the Judge to discuss the

fate of the appeal issue. Counsel Gregg told Petitioner that he could appeal his conviction and get an appeal bond set by the court. However, counsel also told Petitioner that he had not been retained to do the above things (pursue the appeal or get bond set). At this time Petitioner and his family explained to counsel Gregg's that they were unable to pay him for handleing the appeal. (See Exhibits A & B). Petitioner, after being led to believe an appeal was only possible if he paid for same, allowed counsel Gregg to withdraw his appeal notice. Petitioner's agreement to let counsel Gregg withdraw his appeal notice was not done with knowing and intelligent participation by him. *Collier v. Estelle*, 438 F.2d 929, Counsel Gregg never advised Petitioner that he could appeal his case as an indigent, i.e., without paying for the attorney or the court records. (See Exhibit's A & B).

VI.

WITHDRAWAL BY COUNSEL GREGG OF APPEAL

22. Petitioner and counsel Gregg, after concluding their appeal discussion, went back before the trial Judge. Mr. Gregg advised the Judge that they had reached a decision to withdraw Petitioner's notice of appeal. The trial Judge never inquired of Petitioner as to whether he was making a knowing and intelligent participation in the withdrawal of his appeal. The Court also failed to advise Petitioner about his right to appeal with court appointed counsel and free records because he was indigent.

VII.

EFFECTIVE OR INEFFECTIVE; APPEAL RIGHTS

23. It is well settled that an indigent accused is denied effective assistance of counsel at a critical stage of the criminal process when his attorney fails to advise him of his rights to appeal with court appointed counsel, the procedures and time limitations involved in the appeal process. *Lumpkin v. Smith*, 439 F.2d 1084; *Bends v. Wainwright*, 579 F.2d 317. The *Lumpkin* standards announced for court appointed counsel are now equally binding upon retained counsel. *Cuyler v. Sullivan*, 446

BEST AVA

U.S. 335, 100 S.Ct. 1708, 64 L.Ed. 2d 333 (1980); *Perez v. Wainwright,* 640 F.2d 596 (5th Cir. 1981).

24. Counsel Gregg's was well aware, as evidenced from Exhibits A & b attached hereto, of Petitioner's desire to continue with the appeal of his conviction. Also, Counsel Gregg was aware that Petitioner was indigent for appeal purposes, especially since he could'n afford to pay for Gregg's assistance on appeal. Counsel Gregg had a duty under the sixth amendment to the constitution of the United States to advise Petitioner about his right to petition the court for the assistance of appointed counsel to prosecute his appeal. Counsel Gregg deliberately lead Petitioner to believe that an appeal in his case was impossible unless he could afford to pay his own counsel, which was error. *Martin v. State of Texas,* 694 F.2d 423 (5th Cir. 1982).

VIII.

GROUND OF ERROR 9.B. RESTATED

DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW IN VIOLATION OF THE 14th AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DUE TO THE TRIAL COURTS FAILURE TO ADVISE PETITIONER OF HIS APPEAL RIGHTS

25. Petitioner's constitutional rights to appeal from the conviction imposed upon him in Cause No. 223395 has been abridged by the failure of the trial court judge to advise him of his appellate rights, and the fact that the court would appoint him an attorney and provide him with a free copy of the trial court records if he was unable to afford the cost of paying for same. *Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824 (1967). It is evident from the court's dockett sheet enteries for November 10, 1975, and Petitioner's Exhibit's A & B, that the trial court was aware of Petitioner's desire to appeal his conviction. The court knew, or should have had an indication that there was an unresolved dispute between Petitioner and counsel Gregg about the appeal when, after counsel Gregg told the court he was withdrawing Petitioner's notice of appeal, Petitioner advised the Judge that he was not going to dismiss his appeal.

LABLE COPY

26. The trial Judge, instead of inquiring of Petitioner about his appeal, and as to what he wanted to do about his appeal, told counsel Gregg and Petitioner to go into his chambers and see if they could reach an agreement among themselves. It is important to note here that the trial Judge was aware that Petitioner was a layman of the law, 19 years old and being sentenced on a felony conviction for the first time in his life. Petitioner has no prior knowledge or experience with court room and appeal procedures on sentencing by the court. Petitioner was shown by some inmates in the county jail how to prepare his crude pro se notice of appeal so that his appeal rights would be protected. It is not reasonable for a prudent person to believe that a 19 year old Petitioner with no type of past criminal experience with Texas trial tatics or appellate procedures, should have or could have known that he was entitled to court appointed counsel for the purpose of his appeal. To even think such a thing would be to spin a web of imigination within ones mind that would make Agatha Christie proud. It is beyond a "shadow of doubt" that the trial court was more than cursorly aware of Petitioner's desire to appeal his case, as evidenced by his pro se notice of appeal, and his streneous objection to the court when counsel Gregg advised that there would be no appeal. (Exhibit's A & B).

27. The trial court Judge abridged Petitioner's right to the process, equal protection of law, effective assistance of counsel, and his right to appeal, due to the cursory attention showed to Petitioner and his appeal rights. *Martin v. State,* supra; *Chapman v. California,* supra.

CONCLUSION

28. WHEREFORE, ALL THINGS CONSIDERED, Petitioner prays that this Honorable Court will grant him an out of time appeal in this Cause, or in the alternative, declare the Judgement, Sentence and Conviction in this Cause to be void and without any lawful effects of Texas Law.

Respectfully Submitted,

/s/
Clifton Fransaw #328962
Beto Two, Rt. 2, Box 250
Palestine, Texas 75801

VERIFICATION

I, Clifton Fransaw, do hereby state upon my oath that I am the Petitioner in the above and herein attached Habeas Corpus Application and the statements and facts contained therein have been read my me and are true and correct.

/s/
Clifton Fransaw, Affiant

SUBSCRIBED AND SWORN TO BEFORE ME THIS 31st DAY OF August, 1983.

/s/
Notary Public in and for
Anderson County, Texas

9-20-86
My Commission Expires:

APPENDIX B

Cause No. 223395-A

EX PARTE	§	IN THE DISTRICT COURT
	§	OF
CLIFTON FRANSAW Applicant	§	HARRIS COUNTY, TEXAS

RESPONDENT'S ORIGINAL ANSWER

Respondent, the State of Texas, by and through its Assistant District Attorney for Harris County, files this, its original answer in the above-captioned cause, having been served with an application for writ of habeas corpus therein pursuant to the requirements of Article 11.07 § 2 of the Texas Code of Criminal Procedure, and would show the following:

I.

History of the Case

Applicant is confined pursuant to the judgment and sentence of the 262nd District Court of Harris County, Texas, in cause number 321485 wherein Applicant was convicted by a jury of murder. The jury assessed punishment, enhanced by one previous felony conviction, cause number 223395, (hereinafter "the primary case") at life imprisonment.

The Fourteenth Court of Appeals affirmed the conviction in cause number 321485 in an unreported per curiam opinion delivered June 30, 1983. *Fransaw v. State,* No. A14-82-022-Cr. Notice of appeal to the Court of Criminal Appeals was given in the primary case; however, said notice was withdrawn on November 10, 1975.

Applicant's previous application for writ of habeas corpus, cause number 321485-A, is currently pending in the trial court.

II.

Reply to Grounds Presented

Respondent denies the factual allegation made in the instant application, except those supported by official court records.

Further investigation is needed to evaluate the merit, if any of Applicant's claim of ineffective assistance of counsel.

III.

Prayer

Respondent, therefore, requests the court to find that there are controverted, previously unresolved facts material to the legality of Applicant's confinement which require further investigation by the court. Respondent further requests the court to order MR. HARRISON GREGG, attorney for Applicant in the primary case, to file an affidavit summarizing the actions taken to represent Applicant and responding to the allegations of ineffective assistance of contained in the application.

Respectfully submitted,

/s/

Patricia Saum
Assistant District Attorney
Harris County, Texas
201 Fannin
Houston, Texas 77002
(713) 221-6657
TBC No. 17676900

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing instrument has been mailed to Mr. Clifton Fransaw, TDC# 328962, Rt. 2, Box 250, Beto II, Palestine, Texas 75801 on the 23rd day of September, 1983.

/s/

Patricia Saum

Cause No. 223395-A

EX PARTE	§	IN THE DISTRICT COURT
	§	OF
CLIFTON FRANSAW Applicant	§	HARRIS COUNTY, TEXAS

ORDER

Having considered the application for writ of habeas corpus in the above-captioned cause and Respondent's answer, the Court finds that there are controverted, previously unresolved facts material to the legality of the Applicant's confinement, namely Applicant's allegations concerning ineffective assistance of counsel in cause number 223395.

To assist the Court in resolving these factual issues, MR. HARRISON GREGG IS ORDERED to file an affidavit summarizing the actions taken to represent Applicant, including trial preparation, in cause number 223395, and responding to the allegations of ineffective assistance of counsel contained in the application for writ of habeas corpus. MR. GREGG IS ORDERED to file said affidavits with the Appellate Division of the District Clerk's Office within twenty days of the signing of this order.

THE CLERK of the COURT IS ORDERED to send a copy of this order to Applicant, a copy of this order to Respondent's attorney, and to send copies of this order, the application and Respondent's answer to:

Mr. Harrison Gregg
Attorney at Law
608 Fannin, Suite 440
Houston, Texas 77002

When the affidavit of MR. GREGG is received, THE CLERK IS ORDERED to send a copy of said affidavits to Applicant and a copy to Respondent's attorney.

THE CLERK IS FURTHER ORDERED not to forward the documents material to this cause to the Court of Criminal Appeals until the Court has so directed.

Signed this, the 3rd day of October, 1983.

/s/
JUDGE PRESIDING

APPENDIX C

Cause No. 223395-A

EX PARTE	§	**IN THE 183rd DISTRICT**
	§	**COURT OF**
CLIFTON FRANSAW Applicant	§	**HARRIS COUNTY, TEXAS**

ORDER

Having considered the application for writ of habeas corpus in the above-captioned cause and Respondent's answer, the Court finds that there are controverted, previously unresolved facts material to the legality of the Applicant's confinement, namely Applicant's allegations concerning ineffective assistance of counsel in cause number 223395.

To assist the Court in resolving these factual issues, MR. HARRISON GREGG IS ORDERED to file an affidavit summarizing the actions taken to represent Applicant, including trial preparation, in cause number 223395, and responding to the allegations of ineffective assistance of counsel contained in the application for writ of habeas corpus. MR. GREGG IS ORDERED to file said affidavits with the Appellate Division of the District Clerk's Office within twenty days of the signing of this order.

THE CLERK of the COURT IS ORDERED to send a copy of this order to Applicant, a copy of this order to Respodent's attorney, and to send copies of this order, the application and Respondent's answer to:

Mr. Harrison Gregg
Attorney at Law
608 Fannin, Suite 440
Houston, Texas 77002

When the affidavit of MR. GREGG is received, THE CLERK IS ORDERED to send a copy of said affidavits to Applicant and a copy to Respondent's attorney.

THE CLERK IS FURTHER ORDERED not to forward the documents material to this cause to the Court of Criminal Appeals until the Court has so directed.

Signed this, the 3rd day of October, 1983.

/s/
JUDGE PRESIDING

APPENDIX D

Cause No. 223395

EX PARTE	§	**IN THE DISTRICT COURT**
	§	
	§	**OF HARRIS COUNTY, TEXAS**
	§	
CLIFTON FRANSHAW	§	**183RD JUDICIAL DISTRICT**

ANSWER TO QUESTIONS SUBMITTD BY THE DISTRICT ATTORNEY OFFICE

TO HONORABLE JUDGE OF SAID COURT:

Comes now HARRISON GREGG, JR., council for the above stated defendant shows:

1) Approximately fifteen (15) hours were spent interviewing the defendant, reading the file, examining trial, talking with the assistant district attorney, rehabilitation visits and court apearances.

2) The defendant was explained what the applicable law was at that time and that his prior record would play a part in the action taken against him. This information was explained on many ocassions.

3) The advice I gave the defendant was extremely competent. I, on more than one occasion explained that the facts weighed heavily against him and again his prior record would play a vital part in his punishment.

4) At all times the defendant was informed that we had gotten a fair and reasonable plea bargain agreement, he was very satisfied with the plea bargain agreement, and the small amount of time he recieved on his case.

5) I am confident that the plea entered by Mr. Franshaw was voluntary and knowing. We discussed what he could possibly recieve if the case pending against him would go to trial. Mr.

Franshaw in my opinion never had any reservations about entering the plea bargain agreement.

Respectfully submitted,

/s/

Harrison Gregg, Jr. #08429500
Texas Professional Tower
608 Fannin, Suite 440
Houston, Texas 77002
713/228-8000

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this the 29th day of November, 1983.

/s/

Notary Public in and for the State of Texas

My commission expires:

_____

APPENDIX E

Cause No. 223395

EX PARTE § **IN THE 183RD DISTRICT COURT**

§ **OF**

CLIFTON FRANSAW § **HARRIS COUNTY, TEXAS**

SUPPLEMENTAL AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared HARRISON GREGG, JR., who being duly sworn by me upon his oath did depose and say:

"My name is Harrison Gregg, Jr., and I am a practicing attorney in good standing with the State Bar of Texas."

"On November 29, 1983, I filed an affidavit in the above-entitled cause in response to an order of the 183rd District Court of Harrison County, Texas."

"This supplemental affidavit is filed to more specifically answer the allegations by Mr. Fransaw that I did not advise him that he had a right to court-appointed counsel on appeal from his revocation of probation."

"I was hired by Mr. Fransaw to represent him on a motion to revoke probation in the 183rd District Court of Harris County, Texas, in cause number 223395. According to the docket sheet, I made my first court appearance with Mr. Fransaw on October 21, 1975. The case was reset on that day until October 31, 1975, for a hearing on the State's Motion to Revoke Probation."

"On October 31, 1975, the probation revocation hearing was

held whereupon Mr. Fransaw entered a plea of 'true' to the allegation in the State's motion that he committed the offense of burglary of motor vehicle in violation of the terms and conditions of probation. The Court admonished Mr. Fransaw as to the consequences of a plea of 'true'."

"Mr. Fransaw's probation was revoked by the Court and his ten year sentence was reformed to four years."

"According to the docket sheet, the Court received a letter from Mr. Fransaw on November 7, 1975, giving notice of appeal. On November 10, 1975, I appeared with Mr. Fransaw in the 183rd District Court."

"I have no independent recollection of this meeting with Mr. Fransaw. I have read his allegations that he, his mother and sister met with me and informed me that they could not afford to pay me for the appeal. Although I do not recall what was discussed in the meeting, I am certain that had Mr. Fransaw advised me of his inability to pay for an appeal, I would have informed him of his right to court-appointed counsel upon proof of indigency."

FURTHER AFFIANT SAYETH NOT.

/s/
HARRISON GREGG, JR.

SWORN AND SUBSCRIBED TO before me the undersigned authority on this the 14th day of December, 1983.

/s/
Notary Public In the State of Texas

My Commission Expires: ____

APPENDIX F

Cause No. 223395-A

EX PARTE § IN THE 183RD DISTRICT COURT

§ OF

CLIFTON FRANSAW § HARRIS COUNTY, TEXAS
Applicant

FINDINGS OF FACT AND ORDER

Having reviewed the documents filed in cause number 223395 and the official court records of the conviction challenged, the Court adopts as Findings of Fact the history of the case as set forth in Respondent's Original Answer. The Court finds that the facts asserted in the affidavits of HARRISON GREGG filed November 29 and December 16, 1983, are true.

This Court finds that Applicant has failed to sustain his burden of proof to show that he received ineffective assistance of counsel on appeal. *Ex parte Alexander,* 598 S.W.2d 308 (Tex. Crim. App. 1980).

This Court finds the statements in Harrison Gregg's affidavits to be credible and that had Applicant advised Mr. Gregg that he was indigent that Mr. Gregg would have advised Applicant of his right to court-appointed counsel.

This Court finds that Applicant never informed the Court that he was indigent and never submitted a pauper's oath.

This Court finds as a matter of law that failure to appeal from the conviction resulting in probation waives the right to appeal and therefore errors in the original proceeding may not be raised in the appeal from the order revoking probation. *Rabb v. State,* 572 S.W.2d 718 (Tex. Crim. App. 1978). Applicant herein did not appeal his initial conviction and entered a plea of "true" to the allegations contained in the State's Motion to Revoke Probation. Inasmuch as a plea of "true" is sufficient,

standing alone, to support the revocation of probation, this Court finds that an appeal from the Court's order revoking probation would have been frivolous.

Applicant has failed to demonstrate that his conviction was improperly obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

THE CLERK IS ORDERED to prepare a transcript of all papers in cause number 223395-A and transmit same to the Court of Criminal Appeals as provided by Article 11.07 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

(1) the application for writ of habeas corpus;

(2) the Respondent's answer;

(3) the Court's orders;

(4) the indictment, judgment and sentence in cause number 223395 (unless they have been sent to the Texas Court of Criminal Appeals pursuant to a post conviction writ of habeas corpus order);

(5) the waiver of jury trial and stipulation of evidence in cause number 223395;

(6) the docket sheet in cause number 223395;

(7) the motion to revoke probation in cause number 223395;

(8) the affidavits of Harrison Gregg filed on November 29, 1983, and December 16, 1983.

THE CLERK is further ORDERED to send a copy of this order to the Applicant Mr. Clifton Fransaw, #328962, Rt. 2, Box 250, Beto II, Palestine, Texas 75801.

Signed on this, the 20th day of December, 1983.

/s/

Judge

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2552

CLIFTON FRANSAW,
Petitioner-Appellant,

versus

RAYMOND PROCUNIER, Director
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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(January 30, 1985)

Before GEE, JOHNSON, and DAVIS, Circuit Judges.

By The Court:*

IT IS ORDERED that Fransaw's motions for a certificate of probable cause and for leave to proceed on appeal in forma pauperis are GRANTED for purposes of this appeal. A certificate of probable cause is required before this Court may entertain a section 2254 appeal. Fed. R. App. P. 22(b); 28 U.S.C. § 2253 (1976); *Fabian v. Reed,* 714 F.2d 39, 40 (5th Cir. 1983). A certificate of probable cause should be granted where the petition makes a substantial showing of the denial of a federally protected right. 714 F.2d at 40. Fransaw has made this showing.

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*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

The state courts considered the merits of the two issues raised in the federal habeas corpus petition. Where the state courts themselves have not relied on the "contemporaneous objection" rule but instead have dealt with the issues raised on the merits, the procedural bar of *Engle v. Isaac,* 456 U.S. 107, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982) and *Wainright v. Sykes,* 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977) does not apply. *Moran v. Estelle,* 607 F.2d 1140, 1142 (5th Cir. 1979).

VACATED AND REMANDED

APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 84-2552

CLIFTON FRANSAW,
Petitioner-Appellant,

versus

RAYMOND PROCUNIER, Director
Texas Department of Corrections,
Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Texas

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ON SUGGESTION FOR REHEARING EN BANC

(Opinion January 30, 5 Cir., 1985, ____F.2d____)
(March 18, 1985)

Before GEE, JOHNSON and DAVIS, Circuit Judges.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellant Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of

said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 36), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge